

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 06-2141 JWL
)	
MELVIN L. GERSTENKORN,)	
)	
Defendant.)	
_____)	

COMPLAINT FOR ERRONEOUS REFUND

The United States of America complains and alleges against the defendant, Melvin L. Gerstenkorn, as follows:

1. This is a civil action in which the United States seeks to recover, with interest, erroneous refunds of federal income, social security and Medicare taxes totaling \$2,934.87 that were issued to the defendant, Melvin L. Gerstenkorn, a result of the misrepresentations and fraudulent statements that Gerstenkorn made on his 2001-2004 Form 1040 tax returns.

Jurisdiction and Venue

2. This civil action has been authorized by the Chief Counsel of the Internal Revenue Service, a delegate of the Secretary of the Treasury, and commenced at the direction of a delegate of the Attorney General of the United States.

3. Jurisdiction is conferred on this Court by 28 U.S.C. §§ 1340 and 1345 and IRC (26 U.S.C.) §§ 7401 and 7405.

4. Defendant Melvin L. Gerstenkorn resides in Topeka, Kansas, within the jurisdiction of this Court.

5. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391 and 1396.

6. On or about March 18, 2005, Gerstenkorn signed and filed IRS Form 1040EZ federal income tax returns with the IRS for the 2001- 2004 taxable years.

7. Implementing the false and fraudulent tax scheme promoted by Peter Eric Hendrickson, Gerstenkorn's self-prepared tax returns falsely stated that he had no (1) wages, tips or salaries; (2) adjusted gross income; or (3) taxable income during each of the 2001-2004 tax years.

8. The Hendrickson scheme is based on the false and frivolous argument that the terms "wages" and "income" for purposes of the federal income tax and for federal tax withholding are limited to government employees. Hendrickson's theories about the supposed narrow application of federal income-tax laws (including his arguments that wages are not income, and that only federal workers are required to pay income taxes) have been uniformly and repeatedly rejected by the federal courts. As one court recently said, the claim that wages are not income "has been rejected as many times as it has been asserted." *Abdo v. United States*, 234 F. Supp.2d 553, 563 (M.D. N.C. 2002), *affirmed*, 63 Fed. Appx. 163 (4th Cir. 2003). Other courts long ago rejected Hendrickson's claim that wages and income for federal income tax and withholding purposes mean only wages and income of government employees. *See e.g., United States v. Latham*, 754 F.2d 747, 750 (7th Cir. 1985) (the argument "that under 26 U.S.C. § 3401(c) the category of 'employee' does not include privately employed wage earners is a preposterous reading of the statute. It is obvious that within the context of both statutes the word "includes" is a term of enlargement not of limitation, and the reference to certain entities or categories is not intended to exclude all others."); *McKinley v. United States*, 1992 WL 330407 (S.D. Ohio, Sept.

3, 1992) (“The plaintiffs assert that only federal officers, federal employees, elected officials or corporate officers are ‘employees’ who are considered to be taxpayers under the Internal Revenue Code. The plaintiffs argue, in essence, that the explicit inclusion of federal officers and employees within the definition of ‘employee’ for the purposes of the I.R.C. operates to exclude all others from the definition. Plaintiffs’ exhibit D-1 in their motion to affirm status determinations calls the Court’s attention to their position on this issue by citing to T.R. 31.3401(C)-1, which explicitly includes the federal government within the definition of employer. However, the plaintiffs’ interpretation of the law comes from a misunderstanding of the law, and has been rejected by the federal courts. *E.g.*, *United States v. Latham*, 754 F.2d 747, 750 (7th Cir.1985); *Peth v. Breitzmann* [85-1 USTC ¶ 9321], 611 F. Supp. 50, 53 (D.C.Wis.1985). In fact, the term ‘employee’ as used in the I.R.C. does include private wage earners. *E.g.*, *Latham* [85- 1 USTC ¶ 9180], 754 F.2d at 750.”).

9. Contrary to his false representations on the Forms 4852 attached to his tax returns, Gerstenkorn did receive IRS Form W-2 Wage and Tax Statements for the 2001, 2002, 2003 and 2004 tax years from his employers (which included Nesco Service Company, Interim Personnel of Jackson, Excel Temporary Services, Labor Pros - Independence, Express Services, Inc., Spherion 4, Business Personnel Services, Inc., Midwest Staff Solutions, and Toys R Us) that correctly reported his wages and the federal income, social security and Medicare taxes withheld from those wages.

10. Gerstenkorn did not attach the W-2 forms that he received from his employers to his tax returns or otherwise submit them to the IRS. Instead, he attached IRS Forms 4852 (“Substitute for Form W-2, Wage and Tax Statement, etc.”) to his 2001, 2002, 2003 and 2004

Form 1040EZ tax returns, signed each Form 4852 under penalty of perjury, and falsely and fraudulently stated on each Form 4852 that each of his employers had paid him no (a) wages; (b) social security wages; or (3) Medicare wages during 2001, 2002, 2003 and 2004.

11. On or about May 27, 2005, based on Gerstenkorn's false and fraudulent representations described above, the Treasury Department issued a 2001 tax refund of \$507.67 to Gerstenkorn. This is the amount of the withheld federal income, social security and Medicare taxes listed on the Form 4852 that Gerstenkorn filed with his 2001 Form 1040EZ tax return.

12. On or about May 6, 2005, based on Gerstenkorn's false and fraudulent representations described above, the Treasury Department issued the following tax refunds to Gerstenkorn:

<u>Tax Year</u>	<u>Amount of tax refund</u>
2002	\$1,212.40
2003	\$ 193.90
2004	<u>\$1,020.90</u>
Total:	\$2,427.20

These are the amounts of the withheld federal income, social security and Medicare taxes listed on the Forms 4852 that Gerstenkorn filed with his 2002, 2003 and 2004 Form 1040EZ tax returns.

13. Gerstenkorn obtained the four tax refunds described in paragraphs 11 and 12, which total \$2,934.87, by fraud and by misrepresentation of material facts as described above.

14. Because Gerstenkorn misrepresented, on his 2001- 2004 Form 1040EZ tax returns that he received no wages, salaries or other income during 2002, 2003 and 2004, and claimed

credit for the federal income taxes that were withheld from his wages or salary for the 2001-2004 tax years, the IRS should not have issued the refunds, and therefore the issuance of the refunds for each of the 2001 (\$507.67), 2002 (\$1,212.40), 2003 (\$193.90) and 2004 (\$1,020.90) tax years was an error.

15. As a result of the erroneous refund for the 2001 tax year, the United States is entitled to judgment against Gerstenkorn in the amount of \$507.67, plus interest from May 27, 2005, to the date of payment as provided by law.

16. As a result of the erroneous refunds for the 2002, 2003 and 2004 tax years, the United States is entitled to judgment against Gerstenkorn in the total amount of \$2,427.20, plus interest from May 6, 2005, to the date of payment as provided by law.

WHEREFORE, the United States prays as follows:

A. That this Court determine that the United States erroneously issued refunds of federal income, social security and Medicare taxes to Melvin L. Gerstenkorn for the 2001, 2002, 2003 and 2004 tax years in the total amount of \$2,934.87;

B. That judgment be entered on behalf of the United States and against Melvin L. Gerstenkorn in the amount of \$507.67, plus interest thereon as allowed by IRC § 6602 from May 27, 2005;

C. That judgment be entered on behalf of the United States and against Melvin L. Gerstenkorn in the amount of \$2,427.20, plus interest thereon as allowed by IRC § 6602 from May 6, 2005;

D. That the United States of America be awarded its reasonable attorneys' fees and costs incurred in this action; and

E. That the Court grant the United States such other and further relief as the Court may deem to be just and proper.

Dated this 10th day of April, 2006.

ERIC F. MELGREN
United States Attorney

/s/ Robert D. Metcalfe
ANNE NORRIS GRAHAM
ROBERT D. METCALFE
STEPHEN J. SCHAEFFER
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
Tel. (202) 307-6525
Fax (202) 514-6770

Attorneys for Plaintiff,
United States of America

DESIGNATION OF PLACE OF TRIAL

The plaintiff, the United States of America, designates Kansas City, Kansas, as the location for the trial in this matter.

/s/ Robert D. Metcalfe
ROBERT D. METCALFE
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044

Attorney for Plaintiff,
United States of America

REQUEST FOR JURY TRIAL

The plaintiff, the United States of America, does not request a jury trial in this matter.

/s/ Robert D. Metcalfe _____

ROBERT D. METCALFE
Trial Attorney, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044

Attorney for Plaintiff,
United States of America